No. 89-175

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In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, at the close of the government's case, the district court should have advised petitioner that he had a right to testify or to remain silent.

2. Whether the district court adequately advised petitioner of his right to counsel when petitioner sought to dismiss his attorney before closing argument.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-16) is not reported, but the judgment is noted at 874 F.2d 817 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1989. The petition for a writ of certiorari was filed on July 31, 1989, and it is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and two counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 15 years' imprisonment on each count, to be followed by five years' supervised release. The court of appeals affirmed.

1. The evidence at trial showed that between 1985 and 1987 petitioner supplied his nephew, Darryl Winston, with cocaine, which Winston in turn sold to Kenneth Juarez. The arrangement unraveled when, on May 8, Juarez was arrested at the airport in Seattle, Washington, after picking up a package of cocaine that Winston had mailed to him from Los Angeles. Juarez agreed to cooperate with the authorities and thereafter asked Winston to supply him with one kilogram of cocaine. Petitioner informed Winston that the kilogram would cost $31,000. On May 28, 1987, petitioner brought the cocaine to Seattle. Both he and Winston were arrested after delivering the drugs to an undercover officer. Pet. App. 3-4; Gov't C.A. Br. 4-10.

2. At the close of the government's case, defense counsel E. Gary Donion requested a recess to discuss with petitioner the evidence that the defense would present. After the recess, Donion requested a continuance; he explained that the defense had not anticipated that the government would finish presenting its case that day, and that he wanted "more opportunity" to discuss with petitioner whether petitioner should testify, since he and his client found it "hard to have a rushed conversation in the hall regarding his testimony or not." 11/10 Tr. 172; Pet.

App. 8.[1] The court denied the motion, reasoning that counsel's request was dilatory since the defense had had ample time to plan trial strategy previously. Pet. App. 9. Donion replied that petitioner would rest. 11/10 Tr. 173. The prosecutor then interjected that petitioner had a right to testify, if he chose to do so. Petitioner did not assert that he wanted to testify. 11/10 Tr. 173-174. The court then recessed for the Veteran's Day holiday.

When the court reconvened, petitioner submitted a pro se motion for a mistrial claiming ineffective assistance of counsel, judicial bias, and prosecutorial misconduct. 11/12 Tr. 2; Pet. App. 10. Petitioner indicated in his motion that he had retained new counsel who could assist him in a retrial (Pet. App. 19), although he did not ask to substitute counsel in his ongoing trial.

Upon receipt of the motion, the district court advised petitioner that he had a right to represent himself and a right to counsel. 11/12 Tr. 2. Petitioner indicated that he would like his present counsel, Donion, to represent him on his motion. 11/12 Tr. 2-3. The district court found that Donion had competently represented petitioner thus far. The court then addressed petitioner (11/12 Tr. 4):

> If you * * * wish to further participate in the instructions, since it's your case, you can make that decision. If you wish to make a closing statement to the jury on your behalf, you can do so. That is your election and your election alone to make. Or Mr. Donion can make it. It's up to you, sir, and your attorney.

With petitioner and Donion present, the court then discussed jury instructions. During the course of this discussion, Donion moved to withdraw as counsel, and the

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[1] Because the appendix to the petition excerpts parts of the transcript out of chronological order (see Pet. App. 23-37), we refer to the trial transcript by date as necessary to clarify the sequence of events.

court denied his motion. 11/12 Tr. 10. Thereafter, Donion made a motion on petitioner's behalf pertaining to an item of evidence. Petitioner interjected that Donion was no longer representing him. 11/12 Tr. 11. Donion informed the court that petitioner had instructed him not to argue, and he requested a continuance for the purpose of consulting with a colleague. 11/12 Tr. 22-23. The court reiterated that it would not relieve Donion as counsel, that there would be no continuance, and that petitioner himself should decide whether he or Donion would give the closing argument. 11/12 Tr. 23-24. During the same exchange, the court sua sponte revoked petitioner's bail on the ground that petitioner posed a security risk to the court and others. 11/12 Tr. 22-23, 51. The court then granted Donion a five minute recess to confer with petitioner. 11/12 Tr. 24.

After the recess and the government's closing argument, the court repeated to petitioner that he had the right to make a closing argument or to have his attorney do so. 11/12 Tr. 51. Donion informed the court that he had twice conferred with petitioner, that he had told petitioner that a closing argument should be made, and that petitioner had indicated he did not want Donion to make a closing argument and did not wish to make a closing argument himself. 11/12 Tr. 52. Upon repeated questioning by the judge, petitioner stated that he did not intend to make a closing argument, and that he did not want Donion to continue as his attorney. 11/12 Tr. 55. Neither petitioner nor Donion gave a closing argument.

3. The court of appeals affirmed in a unanimous, unpublished opinion. The court found no basis in the record for petitioner's claim that his attorney failed to advise him that he had a right to testify at trial. The court noted that the record in fact indicated that the court granted defense counsel a brief recess to consult with petitioner at the close

of the government's case, after which defense counsel had complained only that it was difficult to "have a rushed conversation in the hall" regarding whether or not petitioner should testify. Pet. App. 8-9. The court of appeals concluded that the district court was not required to advise petitioner that he had a right to testify, and that the district court had not abused its discretion in refusing to grant a longer recess, especially since two continuances had already been granted. Pet. App. 9.

The court of appeals next determined that petitioner had waived his right to make a closing argument. The court first noted that the district court properly allowed petitioner to proceed pro se after it received the motion for a mistrial, although it required defense counsel to remain present in the event that petitioner needed to consult with an attorney. The court then weighed the fact that the district court had specifically told petitioner that he had the constitutional right to counsel, that he had the right to make a closing argument, and that if he remained silent he would waive that right. The court also noted that defense counsel had emphasized the importance of giving a closing argument when counsel sought permission to make a closing argument over petitioner's objection. Under these circumstances, the court determined that the district court did not commit error when it failed to advise petitioner in detail of the dangers of self-representation, as would be required in the case of a defendant who elected to conduct his entire trial pro se. Pet. App. 10-12.

ARGUMENT

1. The court of appeals correctly held that a district court is not required during trial to advise a defendant who is represented by counsel that he has a right to testify or to remain silent. If the defendant does not affirmatively

state that he wishes to testify, a district court has no duty to question whether the waiver is a knowing and voluntary one. *United States* v. *Martinez,* No. 87-1094 (9th Cir. Aug. 23, 1989), slip op. 9885; *Ortega* v. *O'Leary,* 843 F.2d 258, 261 (7th Cir.), cert. denied, 109 S. Ct. 110 (1988); *United States* v. *Bernloehr,* 833 F.2d 749, 751-752 (8th Cir. 1987); *United States* v. *Janoe,* 720 F.2d 1156, 1161 n.9 (10th Cir. 1983), cert. denied, 465 U.S. 1036 (1984). Rather, it is "[t]he accused [who] must act affirmatively" to express his desire to testify. *United States* v. *Systems Architects, Inc.,* 757 F.2d 373, 375 (1st Cir.), cert. denied, 474 U.S. 847 (1985).

While the right to testify is the defendant's own, the decison whether to testify is, in substantial part, a matter of trial strategy. It is a subject that is traditionally discussed by counsel and his client without intervention from the court. See, *e.g., Martinez,* slip op. 9879-9880. In this case, the need for district court intervention was particularly lacking, because defense counsel indicated to the court that he had discussed the issue with petitioner during a recess. Pet. App. 34. The prosecutor likewise informed petitioner on the record that he had a "right to testify." Pet. App. 35. Although petitioner filed motions in his own behalf, he never indicated a desire to testify. The court therefore had no reason to believe that petitioner was unaware of his options. In the absence of a conflict among the circuits on this issue, and in light of the fact that both defense counsel and the prosecutor advised petitioner of his right to testify, further review of this issue is unwarranted.[2]

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[2] The cases relied on by petitioner are inapposite. For instance, in *United States* v. *Plattner,* 330 F.2d 271 (2d Cir. 1964), the court of appeals held that a defendant has a right to appear pro se in a coram nobis proceeding. In *United States ex rel. Wilcox* v. *Johnson,* 555 F.2d 115 (3d Cir. 1977), defense counsel asked to withdraw if the

2. Petitioner also argues (Pet. 9-10) that the district court should have advised him of the perils of self-representation and should have expressly informed him that he had a right to counsel. But the record shows that when petitioner filed a motion for a mistrial on grounds of ineffective assistance of counsel, the district court immediately advised petitioner that he had a right to counsel. 11/12 Tr. 2. In addition, petitioner's motion came at the conclusion of the trial, when only closing arguments remained to be made. At the direction of the court, defense counsel continued to represent petitioner in a stand-by capacity until the conclusion of trial.[3] See generally 11/12 Tr. 2-10. Petitioner himself never asked to substitute new counsel for Donion. The court of appeals correctly determined that under these circumstances and given the district court's and defense counsel's explicit advice to petitioner concerning the only trial decision yet to be made, whether to present a closing argument, the district court

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defendant testified despite her contrary advice. The district court then instructed the defendant that if he testified, counsel's motion to withdraw would be granted and the defendant would be required to represent himself. The court of appeals held that the district court had impermissibly burdened the defendant's right to testify by telling him that he would forfeit his right to counsel if he testified. *Id.* at 119-121. Petitioner was not forced to make such a choice.

[3] Petitioner appears to suggest (Pet. 9-10, 12, 13-14) that the district court erred by requiring defense counsel to remain at counsel table while simultaneously clarifying that petitioner could make the decision whether to give closing argument himself. In fact, the district court's action in requiring Donion to remain available as stand-by counsel to assist petitioner as necessary has repeatedly been recognized as a prudent course for safeguarding the rights of a defendant. See, *e.g.*, *United States* v. *Welty*, 674 F.2d 185, 193 n.5 (3d Cir. 1982); *Wilks* v. *Israel*, 627 F.2d 32, 34-36 (7th Cir. 1980); cf. *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 133-134 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976).

was not required to advise petitioner on the perils of self-representation. Compare *United States* v. *Padilla*, 819 F.2d 952, 958 (10th Cir. 1987) (defendant represented himself for the entire trial, without stand-by counsel); *United States* v. *Welty*, 674 F.2d 185, 189 (3d Cir. 1982) (same).

Finally, petitioner was not denied his right to make a closing argument to the jury, as petitioner suggests (Pet. 10-12). To the contrary, the court repeatedly invited petitioner to "make a closing statement to the jury." 11/12 Tr. 4, 51-55. The court clearly explained that petitioner could choose to give the closing argument himself, to have Donion give the argument, or to make no argument at all. Donion repeatedly explained to petitioner the advisability of making a closing argument. On the record before the judge, the prosecutor, and petitioner, Donion reiterated that advice as well as his willingness to give closing argument. Petitioner instead elected to forgo his opportunity to address the jury. See generally 11/12 Tr. 51-55.[4]

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[4] Nor does petitioner's claim (Pet. 13-14) that the district court was biased against him have merit. Petitioner predicates this claim on the fact that the district court revoked his bail at the close of the government's case. As the court of appeals determined (Pet. App. 12-13), the district court apparently recognized the strength of the government's proof and was concerned that petitioner posed a threat to flee the jurisdiction. Contrary to petitioner's suggestion (Pet. 13-14), nothing in the record indicates that the court conditioned the availability of bail on a decision by petitioner to accept counsel. Rather, the court revoked bail during a colloquy with defense counsel Donion, not petitioner. See Pet. 13. The decision to revoke bail shortly before the verdict was certainly within the court's discretion. In any event, the jury was never informed that petitioner's bail was revoked and petitioner does not allege that he was prejudiced by the decision. Therefore, the revocation of bail would not entitle petitioner to a new trial even if it was erroneous. Cf. *United States* v. *Hasting*, 461 U.S. 499 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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